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No. 368

In the Supreme Court of the United States

OCTOBER TERM, 1960

AMERICAN MOTOR SPECIALTIES CO., INC., ET AL.,
PETITIONERS
v.
FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. 24–32) is reported at 278 F. 2d 225. The opinion and order of the Federal Trade Commission (R. 26a–35a)[1] are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 1960 (Pet. 31–32). The petition for a writ of certiorari was filed on August 30, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "R. —a" refers to petitioners' appendix in the court of appeals; "R. —b," to the Commission's.

QUESTIONS PRESENTED

Petitioners are 17 jobbers of automotive replacement parts and a corporation which they organized for the purpose of channeling their purchases through it in order to obtain, upon the basis of the aggregate purchases made through the corporation, discounts granted by sellers on annual purchase volume. The Commission found that petitioners thereby knowingly received prohibited price discriminations, in violation of § 2(f) of the Clayton Act. The five "questions presented" which the petition sets forth (pp. 2–5) appear to present only the following issues:

1. Whether the Commission had jurisdiction to issue a cease and desist order against the corporation through which the jobber members purchased.

2. Whether the Commission's findings are supported by substantial admissible evidence.

3. Whether petitioners' conduct is given exemption by § 4 of the Robinson-Patman Act.

STATUTES INVOLVED

Sections 2(a) and 2(f) of the Clayton Act, 15 U.S.C. 13(a), 13(f), and § 4 of the Robinson-Patman Act, 15 U.S.C. 13b, are set forth in Appendix B to the petition for certiorari (Pet. 33–35).

STATEMENT

The jobber petitioners sell automotive parts to garages, service stations, car dealers, fleet owners and other jobbers, in competition with other jobbers and wholesalers (R. 2b, 21b, 47b, 48b, 52b–53b, 70b, 71b, 74b). Many manufacturers from whom the jobbers purchase have allowed rebates from their list

prices, the rebate being based upon the customer's total purchases during a year's time (R. 14a). The jobber petitioners set up a system of group buying, utilizing a corporation organized under the New York Cooperative Corporation Law, so as to obtain from the seller-manufacturers rebates calculated on the aggregate purchases of the corporate members (*ibid.*) The group undertook to negotiate with sellers a satisfactory price arrangement, and if negotiations were successful the jobber members, although ordering individually, placed their orders in the name of the corporate buying agent (Pet. 26). The seller delivered goods so purchased direct to the actual purchaser (R. 16a), but the buying agent paid for the goods delivered, remitting monthly for the aggregate purchases of its members and collecting in turn from the purchasing members (R. 15a). Periodically the buying corporation distributed among its members the net amount received as rebates (*i.e.*, the gross rebates received less the expenses of the group-buying operation), in proportion to the amount of the individual member's purchases (*ibid.*).

The Commission found that there was no difference of substance between purchases thus aggregated for the purpose of obtaining rebates not otherwise available and purchases made by the jobbers acting individually and independently (R. 16a), and that the group buying was, in reality, a bookkeeping device for the collection of rebates and discounts (R. 15a). It found that the price differentials which the petitioners obtained were substantial, and that the resulting discriminatory prices lowered their purchasing

costs and gave them a material competitive advantage over other jobbers (R. 19a, 20a). It further found that petitioners knew that the rebates which they obtained did not reflect cost saving to the seller resulting from differing methods of delivery or differing sales volume, and that they accordingly knowingly induced and received prohibited price discriminations in violation of § 2(f) of the Clayton Act (R. 21a, 23a).[2]

ARGUMENT

1. Petitioners contend that the complaint failed to allege that the buying corporation utilized to procure price discriminations, petitioner Metropolitan Automotive Wholesalers Cooperative, Inc., was "engaged in" interstate commerce so as to be within § 2(f), which makes it unlawful for any person "engaged in" interstate commerce knowingly to induce or receive a prohibited price discrimination. That argument was not presented to the court below (R. 8a-9a), and accordingly affords no basis for certiorari. See *Helvering* v. *Minnesota Tea Co.*, 296 U.S. 378; *Burnet* v. *Commonwealth Improvement Co.*, 287 U.S. 415; *Federal Trade Commission* v. *Travelers Health Assn.*, 362 U.S. 293, fn. 4 at 298–299. In any event, the contention is without merit. A corporation clearly is engaged in interstate activity sufficient to bring it within § 2(f) when, as alleged and proved here, it is regularly engaged, as an agent for others, in the purchase of goods for shipment and delivery across state lines, and in making remittances in pay-

[2] The findings referred to, initially made by the Examiner, were adopted by the Commission (R. 35a).

ment for goods so shipped. *United States* v. *South-Eastern Underwriters Assn.*, 322 U.S. 533, 547, 553, *Quality Bakers of America* v. *Federal Trade Commission*, 114 F. 2d 393, 399 (C.A. 1).

2. Petitioners contend that there is no competent evidence adequate to support the Commission's findings, because the supporting evidence consisted primarily of charts of manufacturers' sales to petitioners, and these charts were improperly admitted in evidence (Pet. 12–17). The charts, which were prepared by Commission accountants to summarize information disclosed by their investigation of certain corporate records (see Pet. 30), were objected to on the ground that they did not meet the tests of 28 U.S.C. 1732(a) governing admissibility of records made in the regular course of business.[3] But § 1732(a) applies only to "court" proceedings, and petitioners' objection based on that section plainly was not well taken. Moreover, it is settled, by statute[4] and by judicial decision,[5] that administrative agencies are not bound to adhere to common law exclusionary rules of evidence. And the apparent objection that the charts are of low probative value (Pet. 15) raises a question of the weight of the evidence, which is committed to the Commission, not a reviewing court.

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[3] See Examiner's ruling quoted by petitioners (Pet. 15).

[4] Section 5 of the Administrative Procedure Act provides that in administrative proceedings "any oral or documentary evidence may be received," * * *. 5 U.S.C. 1006(c).

[5] *Willapoint Oysters, Inc.* v. *Ewing*, 174 F. 2d 676, 690-691 (C.A. 9), certiorari denied, 338 U.S. 860. See also *United States* v. *Kelley*, 105 F. 2d 912 (C.A. 2); *United States* v. *Becker*, 62 F. 2d 1007 (C.A. 2); *United States* v. *Cotter*, 60 F. 2d 689 (C.A. 2), certiorari denied, 287 U.S. 666.

A further question raised as to the sufficiency of the evidence relates to whether the Commission satisfied the burden of proof resting on it in a § 2(f) proceeding to show that a buyer charged with violation knew that the low prices which he had received were price discriminations illegal under the provisions of § 2(a) (Pet. 17–19). In *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61, this Court held that in a § 2(f) proceeding the Commission has in this respect the burden of going forward with the evidence, but the opinion also pointed to circumstances which, if established, would satisfy that burden. 346 U.S. at 79–81. In the instant case the court below observed that the very circumstances thus referred to in *Automatic Canteen* had been established (Pet. 28–29). Petitioners fail to show error in the court's reasoning or conclusion.

3. Petitioners' final point (Pet. 19–20) is that their conduct is given exemption by § 4 of the Robinson-Patman Act, 15 U.S.C. 13b, which provides that nothing contained in the Act (which *inter alia* amended § 2 of the Clayton Act) shall prevent a cooperative association from returning to its members its net earnings in proportion to their purchases or sales from, to, or through the association. The same claim of exemption, in a case involving violation of § 2(c) of the Clayton Act, was made and rejected in *Quality Bakers of America* v. *Federal Trade Commission*, 114 F. 2d 393, 400 (C.A. 1). The court below dealt with the contention aptly and decisively as follows (Pet. 30):

> Section 4 does not confer upon cooperative associations any blanket exemption from the

Robinson-Patman Act. It only protects a cooperative association from charges of violating the Act premised upon the association's method of distributing earnings. See *Farmers Cooperative Co. v. Birmingham*, 86 [F.] Supp. 201, 230 (N.D. Iowa 1949). The fact that earnings which result from illegal activity may be distributed to the association's members does not insulate the association from prosecution for the illegal activity. Clearly Section 4 does not permit a cooperative to violate Section 2(f) even though its savings through receipt of discriminatory prices are passed on to its members.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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